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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH WALKER, Defendant and Appellant.	B201678 (Los Angeles County Superior Ct. No. BA321620)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed.

Richard S. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James W. Bilderback II and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Kenneth Walker appeals from the judgment entered following a jury trial in which he was convicted of two counts of furnishing or giving away cocaine base. Appellant contends the trial court erred by failing to include a useable quantity element in the jury instruction on the charged offense, denying appellant's motion for appointment of an expert in the field of eyewitness identification, failing to instruct upon identification, and failing to terminate appellant's self-representation and substitute standby counsel upon appellant's request. We affirm.

FACTS

Los Angeles Police Department Officer John Armando and Detective Burt Feldtz were in an unmarked car, conducting undercover surveillance on Sixth Street between Towne and Stanford Avenues in downtown Los Angeles at about 4:50 p.m. on April 23, 2007. They saw appellant walking along the sidewalk on Sixth Street almost directly across from their position. Two men were following closely behind appellant, which Armando testified was a common behavioral pattern of a seller and potential buyers of cocaine base. After about 10 seconds, appellant stopped, crouched down, and removed several small, solid, off-white objects resembling cocaine base from his front pants pocket. Appellant handed two of the objects to one of the men, later identified as Vacio, and one of the objects to the other man, later identified as Ayala. Vacio and Ayala walked away in opposite directions. Appellant lingered for a few seconds, then walked east. Armando and Feldtz called for uniformed officers who were part of their team to arrest Vacio and Ayala. As the officers approached, Ayala and Vacio discarded the items they obtained from appellant. Armando and Feldtz then detained appellant at the southwest corner of Sixth Street and Gladys Avenue, about 120 feet from the site of the

transaction. A search revealed appellant had a glass pipe of a sort commonly used to smoke cocaine base, but no money.

Officers recovered the items discarded by Ayala and Vacio. The gross weight of a baggie and the two rocks given to Vacio was 1.6 grams, including .15 grams of cocaine base. The gross weight of a baggie and the rock given to Ayala was 1.2 grams, including .0068 of cocaine base.

Appellant waived his right to counsel and represented himself throughout the proceedings. At trial, he testified he had just smoked all of his rock cocaine before the officers saw him, and did not have any rocks left. He denied handing drugs to anyone. He explained that he bent down and placed his hand on his intestines to ease his hernia pain. He saw the police officers looking at him as he did so. The men to whom he allegedly furnished drugs purchased drugs right in front of him and he offered them his pipe. One of them gave him a quarter. Appellant insisted the police officers lied about seeing him hand drugs to the men.

The jury convicted appellant of two counts of furnishing or giving away cocaine base in violation of Health & Safety Code section 11352.[1] Appellant admitted allegations he had suffered a prior serious or violent felony conviction and served a prior prison term within the scope of Penal Code section 667.5, subdivision (b). The court sentenced appellant to a second strike prison term of nine years.

DISCUSSION

1. Useable quantity element

During a discussion of jury instructions, appellant objected to the trial court's omission of the useable quantity element from CALCRIM No. 2300. The court explained

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[1] Unless otherwise noted, all further statutory references pertain to the Health & Safety Code.

that it did not believe the offenses of furnishing or giving away a controlled substance included a useable quantity requirement. The court subsequently instructed that in order to convict appellant, the jury had to find he furnished or gave away a controlled substance, he knew of its presence and its nature or character as a controlled substance, and the substance contained cocaine base.

Appellant contends the trial court erred by failing to instruct the jury that a conviction of violating section 11352 required a finding that he furnished or gave away a useable quantity of cocaine base.

Section 11352, subdivision (a) provides as follows: "Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in . . . paragraph (1) of subdivision (f) of Section 11054, . . . unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years."

Whether the offense of furnishing or giving away a controlled substance includes a useable quantity element is an unresolved question we need not resolve here. Assuming, for the sake of argument, that the offense requires a useable quantity, the trial court's failure to instruct upon such an element was harmless beyond a reasonable doubt on this record. "[T]he *Leal*[**2**] usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven." (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66.) Armando and Feldtz testified they saw appellant remove from his pocket three solid rocks. Although these rocks were

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2 *People v. Leal* (1966) 64 Cal.2d 504.

small, they were necessarily greater than a mere residue or useless trace. Indeed, Armando testified the rock appellant gave Ayala was a common single dose usually sold for $5.00, while the rocks appellant gave Vacio were worth about $20.00. Moreover the willingness of Ayala and Vacio to take the rocks from appellant gave rise to an inference that a useable quantity was involved. Accordingly, there is no reasonable possibility the jury would have acquitted appellant if it had been instructed that a useable quantity must be given or furnished to violate the statute.

2. Appointment of identification expert

Appellant contends the trial court improperly denied his oral motions for appointment of an expert in the field of eyewitness identification.

At a pretrial appearance on May 21, 2007, appellant said he wanted "to make an oral motion for an eyewitness expert." The court informed appellant he must put his motion in writing and "prove to me that you need that kind of expert. You have to at least show me why I should grant it." Appellant agreed to do so.

The topic was mentioned again at a pretrial appearance before a different judge on June 22, 2007. Appellant told the court he "had motions to make," but explained he was unable to do so because he had not been given money, access to the law library, minute orders, or a complete police report. After reviewing the record, the court stated, "I see that [Judge Marcus] said all motions need to be in writing and that an oral motion for eyewitness expert was heard and argued and apparently was denied." Appellant insisted he had "never had an eyewitness motion. He said it had to be in writing and I didn't have anything to write on. I haven't been to the law library and haven't had anything to write the motions with, so I have to object to that for the record. I haven't had any motions on my eyewitness expert or anything." The court reiterated that motions must be written. Although appellant did not actually renew his oral motion for appointment of an expert, the court stated it would deny the motion.

An indigent defendant has a statutory and constitutional right to publicly-funded ancillary services—such as appointment of an expert—reasonably necessary to prepare a defense. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1085 (*Guerra*).) The defendant has the burden of demonstrating the need for the requested services "by reference to '"the general lines of inquiry he wishes to pursue, being as specific as possible."'" (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 320 (*Corenevsky*); *Guerra* at p. 1085.) We review the trial court's ruling on a motion for ancillary services for abuse of discretion. (*Guerra* at p. 1085; *Corenevsky* at p. 321.)

Appellant never explained his purported need for appointment of an eyewitness identification expert, despite the trial court's explanation of the necessity for such a showing. Accordingly, appellant did not meet his burden of proof, and the trial court did not abuse its discretion by denying his motion. Moreover, appellant did not defend on the basis of mistaken identity. He admitted the officers saw him with Ayala and Vacio, but claimed the officers either lied about him handing Ayala and Vacio rocks of cocaine or misunderstood what they saw when Ayala or Vacio handed appellant a quarter. Accordingly, expert testimony regarding the reliability of eyewitness identifications would have been irrelevant and inadmissible.

3. Identification instruction

In a related claim, appellant contends the trial court erred by failing to instruct, sua sponte, upon identification. He does not identify a particular pattern instruction or set forth the provisions of the instruction he believes should have been given, but presumably refers to an instruction such as CALCRIM No. 315 or CALJIC No. 2.92.

There is no sua sponte duty to instruct upon factors pertinent to an evaluation of eyewitness identification testimony. (*People v. Cook* (2006) 39 Cal.4th 566, 599; *People v. Wright* (1988) 45 Cal.3d 1126, 1144.) Moreover, even when such an instruction is requested, the trial court is required to give it only where identification is a crucial issue and there is no substantial corroborative evidence. (*Wright* at p. 1144.)

As previously noted, appellant admitted he was the person the officers saw, but disputed their testimony about his conduct. Identification was not an issue at all, let alone a crucial issue. Moreover, given the circumstances surrounding the officers' observation of appellant, most, if not all, of the factors set forth in CALCRIM No. 315 or CALJIC No. 2.92 would have supported the accuracy of the officers' identification of appellant. The officers had a good view of appellant from a relatively short distance in daylight. Both officers observed the transaction through binoculars, and both testified appellant was facing toward their position when he handed the objects to Vacio and Ayala. They observed appellant for more than 10 seconds and were paying close attention because they believed appellant was about to sell contraband to Vacio and Ayala. Nothing in the record suggests the officers were under stress at the time of their observations. Indeed, they were simply performing their jobs.

Finally, the court instructed the jury with CALCRIM No. 226, which informs jurors they must assess witnesses' credibility using their common sense and experience, along with "anything that reasonably tends to prove or disprove the truth or accuracy of that testimony," including various enumerated factors.

For all of these reasons, the omission of an instruction such as CALCRIM No. 315 or CALJIC No. 2.92 was not error.

4. Failure to terminate appellant's self-representation

At the pretrial hearing on June 22, 2007, the court appointed standby counsel for appellant.

Appellant contends the trial court erred by refusing his request to substitute standby counsel in place of appellant.

The fatal flaw in appellant's argument, however, is that he never asked the trial court to permit him to withdraw from self-representation or to substitute standby counsel in his place. At the sentencing hearing, appellant objected to the presence of standby counsel and explained that he had previously asked standby counsel "if he could do my

sentencing, and he said he couldn't. [¶] So I don't understand what he's here for if he couldn't do my sentencing for me. I'm doing it myself. I asked him to take over." Appellant then made various motions, including motions to retain his pro per status until he arrived at a state prison, obtain copies of minute orders, obtain additional pro per funds, and have appellate counsel appointed. Later in the hearing appellant again objected to the presence of standby counsel, referred to a prior communication he had with standby counsel in which he asked the attorney "to take over my case and make a motion for a new trial," and complained that standby counsel was "getting paid more than I'm getting to fight my case, when I get funds, for him to sit there and do nothing, but listen to the case . . . ." Appellant repeatedly told the court he wanted to be sentenced without delay because he wanted out of the Los Angeles County Jail due to "safety and health" concerns.

Appellant's conversations with standby counsel were not requests to the court. His references during the sentencing hearing to conversations between himself and standby counsel focused on his anger at standby counsel. Appellant never told the court that he wanted counsel to represent him, except with reference to his future appeal. Indeed, throughout the sentencing hearing, appellant actively sought to retain his pro per status. It appears appellant wanted to continue to represent himself while delegating particular tasks to standby counsel, such as the preparation of a motion for new trial or presenting appellant's arguments regarding sentencing. Or perhaps appellant confused the role of standby counsel with that of advisory counsel. (*People v. Blair* (2005) 36 Cal.4th 686, 725.) In any event, appellant never asked the court to have standby counsel "take over." The trial court clearly did not err by failing to grant a request that was never made.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TUCKER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.